

Application No. 10/825,522
Amendment dated June 5, 2009
Reply to Office Action of March 5, 2009

REMARKS

Applicant amended independent claims 1, 6, and 11 to further define Applicant's claimed invention. Support for the amendment to independent claims 1, 6, and 11 can be found in the specification at least on page 9, lines 16-17 and 24-30, page 10, lines 14-17, and in FIGS. 2-7. No new matter has been added.

In the Office Action, the Examiner rejected claims 1-15 under 35 U.S.C. § 103(a) as being unpatentable over the combination of U.S. Patent No. 5,645,598 to Brosnahan ("Brosnahan") and U.S. Patent No. 5,593,409 to Michelson ("Michelson '409").

Under Graham v. John Deere, recently reaffirmed by the Supreme Court in KSR International Co. v. Teleflex Inc. et al., 127 S.Ct. 1727 (2007), a combination of references that does not teach or suggest each and every element of the claimed invention supports a finding of nonobviousness. Applicant submits that the combination of Brosnahan and Michelson '409 as proposed by the Examiner does not teach or suggest each and every element of independent claims 1, 6, and 11, as now amended.

Applicant amended independent claims 1, 6, and 11 to recite a method including providing an implant with an "opening of the medial side having a dimension greater than one-half the length of the implant." Applicant further amended independent claim 1 to recite inserting a second implant with "the medial side of the second implant having an opening, the second implant being adjacent to and in close proximity to the medial side of the first implant, the openings of the medial sides of the first and second implants being in communication with each other." Applicant further amended independent claims 6 and 11 to recite "threading the second implant into the second of the overlapping holes . . . the openings of the medial sides of the first and second implants being in communication with each other." Brosnahan and Michelson '409 either alone or when properly combined do not disclose or suggest such methods.

Brosnahan discloses a spinal fusion device "in which the two side walls 48, 50 are concave in shape along the longitudinal axis LA of the body 12b." (Brosnahan, col. 5, lines 50-52.) FIGS. 12 and 14 of Brosnahan show that neither of side walls 48, 48b has an opening in communication with the hollow interior of the implant and having a

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dimension greater than one-half of the length of the implant as recited in independent claims 1, 6, and 11, as now amended. Furthermore, by the Examiner's own admission, "Brosnahan lacks openings in the side walls." (Office Action, page 2, line 22.)

Michelson '409 teaches that "[s]pinal fusion implant 900a has a concave surface 902 which is correspondingly shaped for receiving the convex surface 904 of spinal fusion implant 900b." (Michelson '409, col. 15, lines 27-29.) Applicant submits that none of openings 128, 228, 328, 428, 528, 628, 728, and 828 in the side walls of the implants of Michelson '409 is "an opening of the medial side having a dimension greater than one-half of the length of the implant" as recited in independent claims 1, 6, and 11, as now amended. Accordingly, even when Michelson '409 is combined with Brosnahan as proposed by the Examiner, the combination does not teach or suggest each and every element of the methods recited in independent claims 1, 6, and 11.

Applicant submits the Examiner's rejection of independent claims 1, 6, and 11 and claims dependent therefrom under 35 U.S.C. § 103(a) over Brosnahan in view of Michelson '409 has been overcome.

Applicant submits that independent claims 1, 6, and 11 are patentable and that dependent claims 2-5, 7-10, and 12-15 dependent from one of independent claims 1 and 6, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

In view of the foregoing remarks, Applicant submits that the claimed invention, as amended, is neither anticipated nor rendered obvious in view of the prior art references cited against this application. Applicant therefore requests the entry of this Amendment, the Examiner's reconsideration and reexamination of the application, and the timely allowance of the pending claims.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including

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any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: June 5, 2009

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